Supreme Court, U.S.
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No. 99-1485

IN THE

Supreme Court of the United States

CARRIE CORCORAN, individually and as Executrix of the Estate of Eugene Corcoran, deceased,

Petitioners,

v.

NEW YORK POWER AUTHORITY and WESTINGHOUSE ELECTRIC CORPORATION,

Respondents,

-and-

LEROY W. SINCLAIR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, two additional parties were sued below. John C. Brons and William Josiger, individual employees of Respondent New York Power Authority were improperly omitted from the list of Respondents that appears in the Petition for Writ of Certiorari. *See* Pet. at ii.

CBS Corporation, formerly known as Westinghouse Electric Corporation, is publicly traded, has no parent corporation, and no publicly held company owns 10% or more of its stock.

New York Power Authority is a public authority organized and existing pursuant to the New York Public Authorities Law.

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STATEMENT OF THE CASE

Petitioners fail to present any compelling reasons for this Court to grant a writ of certiorari. The Second Circuit's decisions in this case do not conflict with any decision of any other United States court of appeals on any important manner, no important federal question was decided below, and no departure from the accepted and usual course of judicial proceedings has occurred.

Indeed, Petitioners' appeal is merely a challenge to the Second Circuit's affirmation that the United States District Court for the Southern District of New York did not abuse its discretion in denying Petitioners' request to file third and fourth amended complaints. Petitioners' request to amend came in a reconsideration motion after the court had granted summary judgment in favor of Respondents New York Power Authority ("NYPA") and Westinghouse Electric Corporation ("Westinghouse"). Petitioners further challenge the Second Circuit's refusal to find that the district court abused its discretion in refusing to allow Petitioners' second lawsuit to relate back to a previously dismissed lawsuit that was filed against different parties and alleged different claims. Petitioners' third challenge is to the Second Circuit's affirmation of the district court's admonition that Petitioners' continued litigation of "dubious claims" might result in sanctions.

These two lawsuits filed by Petitioners, while pled under various tort theories, as a public liability action under the Price Anderson Act, 42 U.S.C. § 2210(n)(1), and as a separate civil rights action, restate a single claim for Petitioner Carrie Corcoran's deceased father's alleged occupational exposure to radiation while working on the non-nuclear side of a nuclear facility in the summer of 1985.

During that summer, Respondent NYPA's Indian Point No. 3 Nuclear Power Plant in Buchanan, New York was shut down for routine maintenance and refueling. Pursuant to a contract between NYPA and Westinghouse, Eugene Corcoran, a transient

millwright employed at the time by Westinghouse, performed maintenance work on the turbine unit in the non-nuclear side of the power plant for a little more than two months. Although it is sharply disputed as to whether Mr. Corcoran was actually exposed to harmful levels of radiation at Indian Point No. 3, or indeed, to any radiation at all, the undisputed facts reveal that some contamination[1] was found on a stop valve in the southwest corner of the turbine unit. Petitioners asserted below that NYPA and Westinghouse misrepresented to Mr. Corcoran that the amount of contamination was insignificant and therefore not a cause for concern.

Seven years after working at the power plant, on March 16, 1992, Mr. Corcoran was diagnosed with chronic myeloid leukemia. This diagnosis was confirmed four days later by a second physician. Both doctors discussed with Mr. Corcoran his work history and told Mr. Corcoran that among other occupational exposures, exposure to radiation could cause leukemia.

Two months after his diagnosis, Mr. Corcoran spoke with Stephen Coli, a millwright with whom he had worked at Indian Point No. 3. Mr. Corcoran told Mr. Coli that he had been diagnosed with leukemia and asked him to make inquiries regarding their possible exposure to radiation at Indian Point in 1985. Mr. Coli made some inquiries but uncovered nothing of consequence and abandoned the search.

At about the same time, Mr. Corcoran was encouraged by his ex-wife, Carol Ellis, the prime mover of this lawsuit, to pursue a radiation exposure claim. Although Mr. Corcoran met with attorneys in connection with various occupational injuries, he never filed a claim with respect to his possible radiation

1. A finding of "contamination" alone means nothing because it does not quantify the amount of radiation, which could be as little as 1 millirem. Contamination does not mean *harmful* levels of radiation as Petitioners here have wrongly assumed; it simply means measurable levels of radiation above background levels.

exposure at Indian Point No. 3. However, he did file and settle an asbestos lawsuit after having been diagnosed with asbestosis in October 1992. Mr. Corcoran died on September 25, 1993. On April 5, 1994, twenty-five months after Mr. Corcoran was diagnosed with chronic myeloid leukemia, his daughter, Carrie Corcoran, filed a notice of claim with NYPA, asserting claims for personal injuries and wrongful death.

Corcoran v. New York Power Auth. ("Corcoran I")

The original complaint in this case, filed in the New York State Supreme Court, New York County, on March 15, 1995, asserted a wrongful death claim under various common law tort theories against Respondent NYPA and a dissolved Westinghouse subsidiary, WEDCO. NYPA removed the action to the United States District Court for the Southern District of New York on the ground that Petitioners' claims were governed by the Price Anderson Act, 42 U.S.C. § 2210. After NYPA moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b), Petitioners filed a motion "to estop defendant [NYPA], from asserting an affirmative defense regarding the statute of limitations on the plaintiffs' notice of claim of plaintiffs' action." In addition, Petitioners amended their complaint against NYPA, and filed a separate lawsuit against Westinghouse.

NYPA cross-moved for summary judgment on the ground that Petitioners' lawsuit was barred due to Mr. Corcoran's failure to file a timely notice of claim. Westinghouse also moved for summary judgment. Petitioners then opposed the original Rule 12(b) motion and sought an order consolidating the NYPA and Westinghouse actions.

On November 7, 1995, the District Court (Cote, J.) consolidated both actions. NYPA and Westinghouse again moved to dismiss the consolidated action on December 1, 1995. Petitioners responded by serving a second complaint against Westinghouse and a third complaint against NYPA. The newly amended complaints were fashioned as public liability actions

("PLAs") under the Price Anderson Act, 42 U.S.C. § 2210(n)(1), and alleged claims for negligence, battery, fraud and violations of various federal statutes and regulations. NYPA and Westinghouse filed a third motion to dismiss, which the district court granted in part and denied in part. *See* Pet., App. A at 1-31; *Corcoran v. New York Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996).

After completing extensive discovery regarding the timeliness of Petitioners' claims, on October 16, 1996, NYPA and Westinghouse moved for summary judgment. Petitioners cross-moved for summary judgment and to strike the affirmative defense of statute of limitations. After all briefing on the summary judgment motions was completed, Petitioners presented certain new arguments and new theories of liability in a letter to the district court. NYPA and Westinghouse opposed Petitioners' eleventh hour attempt to shift their arguments and raise new claims.

On September 26, 1997, Judge Cote issued an Opinion granting summary judgment to NYPA and Westinghouse on the grounds that Petitioners' claims were time-barred under New York law. The Opinion also denied Petitioners' cross-motion. *See* Pet., App. A at 32-49; *Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357 (DLC), 95 Civ. 8102 (DLC), 1997 WL 603739 (S.D.N.Y. Sept. 29, 1997).

On October 7, 1997, Petitioners moved for reconsideration pursuant to Fed. R. Civ. P. 59(e). In this motion, Petitioners presented new legal theories, raised arguments never before presented to the district court, and requested permission to amend their complaints to add claims for prima facie tort and for civil rights violations under 42 U.S.C. §§ 1983, 1985 and 1986. In a May 27, 1998 Opinion, Judge Cote reaffirmed her decision granting summary judgment to NYPA and Westinghouse. Significantly, with respect to the claims against NYPA, the court found that Petitioners had failed to present

any evidence or authority previously overlooked by the court. Thus, reconsideration was unnecessary.[2] *See* Pet., App. A at 56; *Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357 (DLC), 95 Civ. 8102 (DLC), 1998 WL 274290, at *3 (S.D.N.Y. May 27, 1998).

Petitioners now seek certiorari because Judge Cote refused to allow Petitioners to amend their complaints after summary judgment. The court reasoned that over the three years since the litigation was commenced, the court had already allowed three prior amendments, addressed numerous claims that were not raised in Petitioners' complaints, adjudicated two substantive motions, and allowed extensive discovery (including fourteen depositions). Moreover, the court noted that Petitioners had already instituted another lawsuit raising all of the additional claims. *See* Pet., App. A at 57-58; *Corcoran v. New York Power Auth.*, 1998 WL 274290, at *4-*5.

On appeal, the Court of Appeals for the Second Circuit affirmed Judge Cote's Opinions. *See* Pet., App. A at 59-86; *Corcoran v. New York Power Auth.*, 202 F.3d 530 (2d Cir. 1999). The Second Circuit held that the district court properly determined that the Price Anderson Act required the application of New York's substantive laws to Petitioners' PLA. Accordingly, the latest date upon which Corcoran's claims could have accrued was March 20, 1992, the day that his diagnosis with leukemia was confirmed. As a result, Mr. Corcoran or his representatives had until June 18, 1992 to file a notice of claim notifying NYPA of his intention to pursue claims against the state authority, as required by New York General Municipal Law § 50-e and New York Public Authority Law §§ 1017(2),

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2. The district court granted reconsideration with respect to Petitioners' claims directed against Westinghouse. Upon reconsideration, however, the court immediately reaffirmed its original decision. *See* Pet., App. A at 56, 58; *Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357 (DLC), 95 Civ. 8102 (DLC), 1998 WL 274290, at *4, *5 (S.D.N.Y. May 27, 1998).

2980. Because the notice of claim was not filed until April 5, 1994, the claims against NYPA were all time-barred. *See* Pet., App. A at 69-77; *Corcoran v. New York Power Auth.*, 202 F.3d at 537-41.

The Second Circuit also affirmed Judge Cote's holding that Petitioners' claims against Westinghouse were barred by the New York Worker's Compensation Law and that Petitioners' battery claim against Westinghouse was time-barred. *See* Pet , App. A at 77-85; *Corcoran v. New York Power Auth.*, 202 F.3d at 541-45.

Finally, the Second Circuit held that because Petitioners had filed a separate lawsuit that had been dismissed on the merits by the time the *Corcoran I* appeal was heard, their request to amend the complaint was moot. *See* Pet., App. A at 85; *Corcoran v. New York Power Auth.*, 202 F.3d at 545.

Corcoran v. Sinclair, et al. ("Corcoran II")

Petitioners commenced *Corcoran II* on December 17, 1997, shortly after Judge Cote granted summary judgment to NYPA and Westinghouse in *Corcoran I*. *Corcoran II* names seventeen individual employees of NYPA and Westinghouse (some of whom lacked even the most tangential nexus to Petitioners' allegations) as defendants responsible for Mr. Corcoran's death. The factual claims in *Corcoran II* are virtually identical to those raised in *Corcoran I*.[3]

On March 2, 1998, the seventeen individual defendants moved to dismiss and/or for summary judgment in *Corcoran II*. Petitioners then cross-moved to amend their complaint to add a count of witness intimidation, to sue the individuals in both their official and individual capacities, to add additional allegations in support of their claims, and to add NYPA and Westinghouse as defendants in *Corcoran II*.

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3. *Corcoran II* was deemed to be a related action to *Corcoran I* and was placed on Judge Cote's docket, who referred the case to Magistrate Judge Katz for all pre-trial purposes.

After demanding that Petitioners withdraw their complaint, the seventeen individual defendants moved for sanctions pursuant to Fed. R. Civ. P. 11, and an injunction precluding Petitioners from filing additional lawsuits against NYPA, Westinghouse or their employees and officers. The sanctions motion was filed shortly after Petitioner Carrie Corcoran graduated from the University of Pennsylvania Law School and shortly before she began a clerkship with the Ninth Circuit Court of Appeals.

On December 1, 1998, Magistrate Judge Katz issued a report and recommendation dismissing all of Petitioners' claims, and denying the motion for sanctions. *See* Pet., App. at 88-127. However, Judge Katz admonished Ms. Corcoran not to file any new lawsuits against Respondents. *See* Pet., App. at 120-25.

By Opinion dated March 30, 1999, Judge Cote adopted the Magistrate Judge's Report and Recommendation, granted the seventeen individual defendants' motion to dismiss and/or for summary judgment, and denied Petitioners' cross-motion to amend the complaint. *See* Pet. App. at 128-57; *Corcoran v. Sinclair*, No. 97 Civ. 9286 (DLC), 1999 WL 177444 (S.D.N.Y. Mar. 30, 1999). The court first determined that Petitioners' civil rights claims based on violations of Nuclear Regulatory Commission regulations were preempted by the Atomic Energy Act ("AEA") and the Price Anderson Act. After surveying the legislative history of the AEA and the Price Anderson Act, the court held that the existence of a PLA and the comprehensive regulatory framework created by those statutes foreclosed a suit under § 1983. *See* Pet., App. A at 136-44; *Sinclair*, 1999 WL 177444, at *5-*8. However, the court did not hold that the comprehensive regulatory scheme foreclosed Petitioners' § 1983 claim for violations of Petitioners' constitutional rights. *See* Pet., App. A at 144-45; *Sinclair*, 1999 WL 177444, at *8-*9.

Judge Cote then dismissed Petitioners' constitutional civil rights claims under the applicable three-year statute of limitations. As in *Corcoran I*, Judge Cote determined that the

latest date that Mr. Corcoran's claims could have accrued was March 20, 1992, the date his diagnosis with leukemia was confirmed. Thus, *Corcoran II* was untimely because neither Mr. Corcoran nor his representatives filed this lawsuit until December 1997. *See* Pet., App. A at 146-51; *Sinclair*, 1999 WL 177444, at *9-*11.[4]

The district court also rejected Petitioners' request to amend the complaint and to allow *Corcoran II* to relate back to the filing of the original *Corcoran I* complaint. According to the court, relation back would be inappropriate because *Corcoran II* was not untimely filed as a result of some misrepresentation by the seventeen individual defendants or because of an "inconsequential pleading error[]." Moreover, the court stated that the relation back provisions of Fed. R. Civ. P. 15 were inapplicable because the causes of action and the defendants in the two actions are different. *See* Pet., App. A at 148-50; *Sinclair*, 1999 WL 177444, at *10.

Finally, the district court adopted the magistrate judge's recommendation to deny the seventeen individual defendants' sanctions motion, yet warned Petitioners against further litigation against NYPA, Westinghouse or the individual Respondents with respect to the same issues raised in *Corcoran I* and *Corcoran II*. *See* Pet., App. A at 156-57; *Sinclair*, 1999 WL 177444, at *13-*14.

The Second Circuit Court of Appeals affirmed the district court without opinion. *See* Pet., App. A at 158-60; *Corcoran v. Sinclair*, 201 F.3d 430 (2d Cir. 1999).

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4. In addition to being untimely, the district court dismissed the claims under 42 U.S.C. §§ 1985 and 1986 for failure to state a cause of action. *See* Pet., App. A at 151-54; *Sinclair*, 1999 WL 177444, at *12-*13.

REASONS FOR DENYING THE WRIT

Nothing in the Petition rises to the level of Supreme Court review. The decisions below are not in conflict with any other Court of Appeals decisions in any circuit nor are they in conflict with any Supreme Court decision. The Petition for Certiorari does not seek any necessary interpretations of the Constitution or Statutes of the United States. Petitioners only complain of an "abuse of discretion" by the District Court; an issue that has been fully and properly adjudicated by the Court of Appeals.

The crux of Petitioners' request for certiorari is the district court's refusal to allow Petitioners to amend their complaints in *Corcoran I* for a third and fourth time. Petitioners made the request to amend, pursuant to Fed. R. Civ. P. 15, in a motion to reconsider summary judgment that was granted in favor of NYPA and Westinghouse. Before the district court decided the motion, however, Petitioners filed *Corcoran II*, in which they asserted all the claims that they desired to add to the dismissed *Corcoran I* complaint, sued seventeen individual employees of NYPA and Westinghouse, but did not sue their employers. Prior to the Second Circuit's decision affirming *Corcoran I*, *Corcoran II* was dismissed on the merits by the district court, which made review of the denial to amend unnecessary.

Petitioners also challenge the district court's refusal to allow the complaint in *Corcoran II* to relate back to the filing date of *Corcoran I*. Petitioners' relation back argument is contrary to the plain language of Fed. R. Civ. P. 15. Moreover, since the defendants named in *Corcoran II* were sued as individuals, and were never sued in *Corcoran I*, they had no notice of the *Corcoran I* lawsuit. Therefore, relation back is clearly improper because they should not be denied their affirmative defense based on the statute of limitations.

Finally, Petitioners challenge the propriety of the warnings issued by District Judge Cote and by Magistrate Judge Katz. The district court acted well within its discretion to formulate appropriate, sound warnings as an alternative to monetary and injunctive sanctions.

I.

THE REQUEST TO AMEND *CORCORAN I* WAS PROPERLY DENIED

Petitioners seek this Court's review because the district court and the Second Circuit denied their request to amend their complaint in *Corcoran I* to add civil rights claims. The district court has absolute discretion " 'whether or not to grant leave to amend, and its decision is not subject to review on appeal except for abuse of discretion.' " *Hillburn v. Maher*, 795 F.2d 252, 264 (2d Cir. 1986) (quoting 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.08[4] (2d ed. 1985)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). In this case, the district court fully and properly considered Petitioners' request to amend their complaint after summary judgment and did not abuse its discretion in denying the request.

While it is true that leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), district courts are not required to grant leave to amend in all circumstances. Indeed, several factors must be considered before amendment of pleadings is permitted, including *inter alia*: (a) undue delay in making the request; (b) bad faith or dilatory motive on the part of the movant; (c) failure to cure deficiencies in the pleadings after repeated amendment; (d) undue prejudice to the opposing party; and (e) futility of the amendment. *See* 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487 (1990) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). In weighing these factors, and in light of the fact that Petitioners had already commenced *Corcoran II* and had already amended

their *Corcoran I* complaints two and three times, there can be no question that the district court's denial of leave to amend was sound.[5]

Petitioners' first request to add civil rights claims to *Corcoran I* was raised in their motion for reconsideration of the summary judgment granted in favor of NYPA and Westinghouse. Petitioners' belated request was properly denied on the grounds that new causes of action, even constitutional ones, cannot be raised on a motion for reconsideration. *Ruiz v. Commissioner of Dep't of Transp.*, 858 F.2d 898, 902 (2d Cir. 1988) ("We believe that it was well within the discretion of the district court to reject a theory so belatedly advanced and so vaguely supported.").

Indeed, the district court's reasoning behind its refusal went far beyond Petitioners' undue delay. The court reasoned that because Petitioners had already amended their complaints on three occasions, and the court had considered claims asserted in briefs yet not raised in any pleading, and because two years of extensive discovery had taken place, and two substantive motions had already been adjudicated, it was time to call a halt to Petitioners' practice of continuous and seemingly endless litigation. *See* Pet., App. A at 57-58; *Corcoran v. New York Power Auth.*, 1998 WL 274290, at *4. Moreover, the court clearly articulated that the prejudice to NYPA and Westinghouse was a factor in its decision by indicating that "it would be inappropriate to allow the plaintiffs to begin this litigation afresh through a motion to reconsider a decision which granted judgment to the defendants." Pet., App. A at 58; *Corcoran v. New York Power Auth.*, 1998 WL 274290, at *4.

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5. Similarly sound was the district court's denial of Petitioners' request to amend the *Corcoran II* complaint. *See* Pet. at 27. Finding that the allegations in *Corcoran II* failed to state a claim and/or were time-barred as a matter of law, the district court concluded that amending the complaint to add NYPA and Westinghouse was futile. *See* Pet. App. at 118-20; *Sinclair*, 1999 WL 177444, at * 13.

In fact, prejudice to the opposing party is considered the most important reason for denying leave to amend, and may occur, "for example, when the amendment is sought after discovery has been closed." *Berman v. Parco*, 986 F. Supp. 195, 217 (S.D.N.Y. 1997); *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995) ("It was entirely reasonable for the district court to deny a request to amend a complaint that was filed two and one-half years after the commencement of the action, and three months prior to trial."); *Gomes v. Avco Corp.*, 964 F.2d 1330, 1335-36 (2d Cir. 1992) ("While we ordinarily require the district courts to give substantial leeway to *pro se* litigants, here [plaintiff] has already amended his complaint three times, once with the benefit of counsel. The district court was well within its discretion in denying leave to amend a fourth time.") (citations omitted); *accord Ansam Assocs., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985); 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1487 (1990).

Allowing Petitioners in this case to amend their complaints after their claims were dismissed on summary judgment would have been "especially prejudicial given the fact that discovery had already been completed and [Respondents] had already [prevailed on] a motion for summary judgment." *Ansam Assocs.*, 760 F.2d at 446; *see also McGoffin v. Sun Oil Co.*, 539 F.2d 1245, 1248-49 (10th Cir. 1976) (affirming denial of motion to amend to add new theory after summary judgment had been entered); *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 971 (6th Cir. 1973) ("[T]o put Schwinn through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial.").

Moreover, it is axiomatic that every litigation must come to an end. To allow a plaintiff to inject new theories into a lawsuit after the claims have been dismissed opens the door to endless

litigation.[6] As the Fifth Circuit observed nearly twenty years ago, "[w]hile we must give a party a fair chance to present claims and defenses, we must also protect 'a busy district court [from being] imposed upon by the presentation of theories seriatim.' " *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. 1981) (second alteration in original) (quoting *Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981)).

Accordingly, the district court's refusal to allow the proposed amendments was not an abuse of discretion.[7] *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424 (7th Cir. 1993) (affirming the denial of motion to amend in part because new claims "could be made the basis of a new suit if the plaintiffs wanted"); *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934, 939 (5th Cir. 1976); *Flintkote Co. v. Diener*, 185 F. Supp. 509, 510 (D.P.R. 1960).

6. Indeed, consistent with their conduct throughout these lawsuits, Petitioners raise for the first time in this appeal that their request for amendment should have been granted pursuant to Fed. R. Civ. P. 15(b). *See* Pet. at 25-26. Simply reading the rule reveals the futility of this argument. The rule states: "When issues not raised by the pleadings are *tried* by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ." Fed. R. Civ. P. 15(b) (emphasis added). Petitioners' civil rights claims were not tried, expressly or impliedly, in *Corcoran I*. Thus, an amendment to conform to the evidence is unwarranted. *See, e.g., DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 917 (1st Cir. 1992); *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 680 (2d Cir. 1985) (" 'The purpose of Rule 15(b) is to allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record.' ") (quoting *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977); *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821, 825 n.3 (8th Cir. 1959).

7. Plaintiffs' request for a summary disposition on the merits should be denied. *See* Pet. at 25-29. None of the issues raised by Petitioners show that the district court abused its discretion. Moreover, the Second Circuit fully adjudicated and affirmed the district court's opinions. Neither summary disposition nor further review is warranted.

II.

THE STANDARD OF REVIEW FOR A RULE 59(e) MOTION DENYING RECONSIDERATION OF SUMMARY JUDGMENT IS NOT RELEVANT

In seeking this Court's review, Petitioners attempt to create an issue regarding a split in the Circuits as to the appropriate appellate standard of review for motions to reconsider summary judgment filed under Fed. R. Civ. P. 59(e). *See* Pet. at 21-24. This issue is a red herring. The issue is neither presented as a question for review (*see* Pet. at i), nor implicated by the facts of this case. Indeed, even if it were properly presented, the minor division in the Circuits regarding whether a Rule 59(e) motion after summary judgment is reviewed under an abuse of discretion standard or under a *de novo* standard is not an issue that merits this Court's attention.[8] Accordingly, the appropriate standard of review for Rule 59(e) motions reconsidering a grant of summary judgment need not be addressed by the Court at this time.

Indeed, Petitioners do not even seek this Court's review of the underlying summary judgment, but merely seek review of the denial of their 59(e) motion to the extent that they were not

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8. The "split" in the Circuits is not nearly as pronounced as Petitioners contend. Petitioners assert that the Third and Sixth Circuits employ a *de novo* review of all Rule 59(e) motions arising from the grant of a summary judgment (regardless of whether the motions raise issues of law or present new or overlooked evidence). *See* Pet. at 26. This is an overstatement. In fact, these Circuits employ a *de novo* review only when the district court has rejected a Rule 59(e) motion based upon an interpretation of law. *See Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348-49 (3d Cir. 1986); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122, n.5 (6th Cir. 1982). For all other Rule 59(e) motions, the courts employ an abuse of discretion standard. *See Federal Kemper Ins. Co.*, 807 F.2d at 348-49 ("the appropriate standard of review for a motion to reconsider is generally abuse of discretion); *Huff*, 675 F.2d at 122 n.5 (same).

allowed to amend the *Corcoran I* complaints. *See* Pet. at 1, 12, 19, 23. And although they do not point to a single opinion where an appellate court has employed any standard other than "abuse of discretion" in such a situation, Petitioners argue, nonetheless, that the Second Circuit should have reviewed *de novo* the denial of their motion to amend. *See* Pet. at 23.

Petitioners' argument ignores well settled law that a motion to amend a complaint is subject to review only upon a showing that the district court abused its discretion in denying the motion. *See Zenith Radio Corp.*, 401 U.S. at 330; *Hillburn*, 795 F.2d at 264; 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.08[4] (2d ed. 1985). Moreover, characterizing the motion to amend as a motion for reconsideration under Rule 59(e) does not enhance the review afforded on appeal. Courts consistently review Rule 15 motions that are brought in conjunction with Rule 59(e) motions under an abuse of discretion standard. *See, e.g., Ford Motor Credit Co. v. Bright*, 34 F.3d 322, 324 (5th Cir. 1994); *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611-12 (5th Cir. 1993); *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180-81 (7th Cir. 1992); *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985).

In any event, in this case, the Court of Appeals reviewed the summary judgment decision *de novo* and noted that by the time the *Corcoran I* appeal was decided, *Corcoran II* had been adjudicated and dismissed on the merits.[9] *See* Pet., App. A at

9. Petitioners assert that dismissal on statute of limitations grounds is not a dismissal on the merits. *See* Pet. at 26. However, "a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits, unless it is specifically stated to be without prejudice." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2d Cir. 1983); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits."); Fed. R. Civ. P. 41(b).

67, *Corcoran v. New York Power Auth.*, 202 F.3d at 536. Hence, the appeal of the district court's decision to deny the amendment was moot. *See* Pet., App. A at 85; *Corcoran v. New York Power Auth.*, 202 F.3d at 545. Consequently, there is no issue in this case regarding the standard of review under Rule 59(e) motions challenging summary judgment.

III.

PETITIONERS WERE NOT ENTITLED TO RELATE *CORCORAN II* BACK TO THE ORIGINAL FILING DATE OF *CORCORAN I*

Petitioners assert that the courts below erred in failing to permit the complaint in *Corcoran II* to relate back to the filing date of *Corcoran I*. Petitioners' argument is totally unprecedented and not even contemplated by Fed. R. Civ. P. 15(c). The Rule clearly states, "[a]n *amendment* of a pleading relates back to the date of the original pleading." Fed. R. Civ. P. 15(c) (emphasis added). The *Corcoran II* complaint was not an amendment to the *Corcoran I* complaints; it was a separate lawsuit which named seventeen new defendants and none of the original defendants. It is well settled that a lawsuit may not relate back to a complaint filed in a prior action, especially when the prior action has already been dismissed on the merits. *See, e.g., Bailey v. Northern Ind. Pub. Serv. Co.*, 910 F.2d 406, 413 (7th Cir. 1990) ("Rule 15(c), by its terms, only applies to amended pleadings in the same action as the original, timely pleading."); *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995-96 (8th Cir. 1989) (affirming refusal to allow subsequent suit to relate back to prior suit asserting different causes of action).[10]

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10. *See also, e.g., Rayo v. New York*, 882 F. Supp. 37, 40 (N.D.N.Y. 1995) ("The relation back doctrine has application only in instances where an original pleading is amended. . . . The amendment does not . . . relate back to any prior proceedings which [are] not part of the

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As the district court noted, the purpose of the relation back doctrine is " 'to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense.' " Pet., App. A at 148 (quoting *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2d Cir. 1997) (citation omitted)). In the 62 page complaint in *Corcoran II*, Petitioners asserted numerous constitutional issues and sought punitive damages against seventeen individual employees of NYPA and Westinghouse. These claims were not pled in *Corcoran I*, nor were the seventeen individual Respondents implicated in that suit. Accordingly, the 336 averments in the *Corcoran II* complaint can hardly be considered "inconsequential pleading errors" that should prevent these individuals from relying on a statute of limitations defense the courts below determined was valid.

Moreover, even though *Corcoran II* was based on the same underlying facts as *Corcoran I*, the seventeen employees sued in *Corcoran II* were not on notice of the *Corcoran I* lawsuit. It would be unjust to drag these individuals, some of whom had little, if any, connection to Eugene Corcoran, into a lawsuit filed more than two years prior to *Corcoran II* and then to deprive them of a statute of limitations defense. *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("The linchpin [of relation back] is notice, and notice within the limitations period."). Because the individuals sued in *Corcoran II* had no notice of *Corcoran I*, the district court was well within its discretion in denying Petitioners' request for relation back. *See* Pet., App. A at 149-50; *Sinclair*, 1999 WL 177444, at *10.

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action in question."); 61B Am. Jur. 2d *Pleading* § 845 (1999) ("the relation back rule cannot be applied to make the filing of a suit relate back to the filing of an earlier, separate suit, even if the claims are related").

IV.

PETITIONERS WERE PROPERLY WARNED AGAINST COMMENCING ADDITIONAL LITIGATION

Although the district court denied the individual Respondents' sanctions motion, Petitioners were properly admonished against commencing further litigation against Respondents arising out of the same facts and issues raised in *Corcoran I* and *Corcoran II*. Indeed, district courts are given great discretion in the selection of an appropriate sanction, and their decision will not be disturbed absent a showing of an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399, 405 (1990). The Second Circuit reviewed the district court's decision in this case and affirmed substantially for the reasons stated by the district court. *See* Pet., App. A at 160.

Petitioners argue that they should not have been warned because they are the financially weaker party and are proceeding *pro se*. Pet. at 19-20. As the district court acknowledged, however, Petitioners ignore the enormous costs incurred by Respondents in defending against Petitioners' multiple lawsuits raising allegation after allegation, many of which the magistrate judge believed had "dubious support." Pet., App. A at 125. Considering Petitioners' appetite for litigation and their decision to sue individual employees of NYPA and Westinghouse in their personal capacity and for punitive damages, the magistrate judge's warning, echoed by the district court, was justified and absolutely necessary to protect Respondents from baseless and costly litigation. *See Goldgar v. Office of Admin., Executive Office of the President*, 26 F.3d 32, 35-36 (5th Cir. 1994) (joining district court in warning pro se litigant against filing successive FOIA complaints); *McCampbell v. KPMG Peat Marwick, LLP*, 982 F. Supp. 445, 448-49 (N.D. Tex. 1997) (issuing a "formal reprimand and stern warning" to pro se litigant as opposed to monetary and injunctive sanctions). Because Petitioners are unable to show that the courts abused their discretion in issuing the warning, further appellate review is unnecessary.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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